APPEAL NO. 983000
FILED FEBRUARY 3, 1999

Following a contested case hearing held in _____, Texas, on August 18 and November 17, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the respondent (claimant) is entitled to lifetime income benefits (LIBS) based on permanent loss of sight in both eyes, that claimant's impairment includes the loss of use of his right hand, that the compensable injury extends to and includes blindness in both eyes, that the compensable injury extends to and includes claimant's right upper extremity, and that income benefits previously paid are to be redesignated as LIBS. The appellant (carrier) has appealed the determination that claimant is entitled to LIBS, asserting both that no finding of fact supports the conclusion on that issue and that claimant waived entitlement to LIBS by waiting for over two and one-half years after his date of injury and long after he was determined to have reached maximum medical improvement (MMI) with a 77% impairment rating (IR) to claim LIBS. Claimant has responded, contending that the evidence is sufficient to support the findings concerning total and permanent loss of sight, that there are sufficient factual findings to support the conclusion that claimant is entitled to LIBS based on permanent loss of sight in both eyes, and that there is no merit to the contention that claimant waived his entitlement to LIBS.

DECISION

Affirmed.

In its appeal the carrier states that "[t]he hearing officer is correct in stating that the facts in this case are not in dispute" but that she erred in her application of the facts to the law. Neither party takes issue with the hearing officer's recitation of the evidence and we adopt it for purposes of this decision. In brief, the medical evidence reflects that claimant sustained a severe heat stroke injury from working in an oilfield on (date of injury), that he collapsed and went into tonic-clonic seizures associated with respiratory distress and a temperature of 107°, that he remained in a coma and unresponsive until late October 1995, and that he began to recover but has many severe medical problems including significant loss of sight.

Claimant testified that he could not see a Texas flag in the hearing room, 10 to 12 feet away; that he could only see "a bulge" where his attorney was sitting, six to seven feet away; that his attorney wore a "white" shirt and "dark" pants when in fact his attorney wore a light blue shirt, red suspenders, and dark blue trousers; that he could not tell the color of the shirt (red) the hearing officer wore; that he can only write his name if someone guides his hand; that he is right-hand dominant and cannot button or feed himself with his right hand; that he gets assistance from a home health care aide in getting in and out of his wheelchair, bathing, dressing, and using the toilet; that since coming out of the coma all he sees are "bulges"; that when he wears an eyepatch he sees one bulge but when he takes it off he sees two; and that he wears glasses because he has been told wearing them will help reduce his double vision.

Claimant's sister, Ms. H, testified that claimant cannot move the wheelchair with his hands but propels himself in it with his feet; that he cannot stand alone without losing his balance and falling; that he cannot tie shoes, see the pictures on TV, bathe, dress or use the bathroom without assistance; that he cannot go out of the house alone; and that when visiting at her house, he runs into objects.

A March 1, 1996, report by Dr. L, a neuro-ophthomologist and medical school professor, noted claimant's history of heat stroke followed by severe residual deficits including visual impairment felt to be cortical blindness. He stated that upon examination, they found "a visual acuity of count fingers at three feet in each eye without correction, but with a - 7.50 + 2.50 x 105 he read 20/200 in the right eye and with a - 6.75 + 1.50 x 100 he read 20/300 in the left eye." Dr. L further stated that it was possible claimant had a "severe, diffuse anoxic event involving ischemic optic neuropathy bilaterally compounded by cortical ischemia." He recommended patching claimant's eye to alleviate the diplopia, a low vision assessment in four weeks, and stated that he doubted anything more could be offered to claimant.

Dr. P, an optometrist, stated in answers to deposition questions that claimant was given a low vision examination on March 19, 1996, to determine his visual acuity and possible ability for enhancement of his remaining vision; that his visual acuities could not be quantified beyond form perception, meaning that claimant can only distinguish form with no detail; that the refraction indicated that claimant is myopic in the right eye and has compound myopic astigmatism in the left; that his visual acuities did not demonstrate an improvement, with or without correction, at that time; that claimant indicated double vision (diplopia) which had a vertical component; and that they were unable to elicit any functional vision that would be benefitted by the use of optical devices. Responding to the carrier's questions, Dr. P stated that visual acuities of 20/200 and 20/300 are not indicative of total loss of sight.

According to a "March 1995" initial evaluation report by an orientation and mobility specialist at the clinic, claimant's most recent visual acuities, taken on "March 27, 1996," were "20/200 bilaterally (with best correction) with no known visual field restrictions."

According to the October 30, 1997, report of Dr. E, a doctor selected by the Texas Workers' Compensation Commission (Commission), claimant's 77% IR included 24% for diplopia.

In a November 24, 1997, letter, Mr. N, a counselor with the TCB, stated that claimant is a current "consumer" with the TCB, that his current visual acuity is "hand motion only" in both eyes, and that he is "legally blind due to cortical blindness with no medical recommendation in order to improve vision disability."

In his answers to deposition questions, Dr. N, an optometrist, stated that he performed various tests on claimant on April 28, 1998; that the most important clinical finding was that claimant's visual acuity is only "20/count fingers at two inches" in the both eyes with his best correction for glasses; and that with this vision, claimant is considered "legally blind and is probably not able to work at any employment requiring vision." He also stated that since claimant's eye structures seem normal, he can assume that the loss of vision is due to damage to the optic nerve as it tracks through the brain or damage to the cortical area of the brain responsible for vision. Responding to the carrier's questions, Dr. N stated that some parts of an eye examination are subjective and other parts objective; that claimant's pupils, corneas, irises, retinas, lenses, and eyeballs, eye sockets, and surrounding tissue and structures were essentially normal; and that while claimant has some vision, he is "legally blind."

In his July 2, 1998, answers to deposition upon written questions from claimant, Dr. K, a physical medicine and rehabilitation specialist, stated that claimant had been under his care since January 22, 1996; that claimant suffered severe brain damage due to heat stroke which has resulted in cortical blindness, severe ataxia (disturbance of equilibrium), severe cognitive deficits, and inappropriate and aggressive behavior; that in his opinion, claimant does not retain sufficient use of his vision to be able to obtain and retain employment requiring use of his vision, is "legally blind" because of his brain damage (cortical blindness), and will not be employable in any work which requires use of vision; and that the cortical blindness is a direct result of the heat stroke injury of (date of injury). In answer to the carrier's questions, Dr. K stated that he observed claimant repeatedly in various activities on the rehab unit and that he acted blind as far as he could tell; that it was the unanimous feeling of the other members of the rehab team that claimant is severely visually impaired; that claimant had no damage to his skull or to his eyes as such but had damage to his brain; and that even if claimant's pupils, corneas, retinas, lenses, eyeballs, eye sockets and surrounding tissue and structures are essentially normal, it is not true that total and permanent loss of sight in both eyes would not be expected because damage to the optic nerve or visual cortex can produce blindness while the anatomical structures of the eyes appear normal. Dr. K further stated that notwithstanding that Dr. L, an ophthomologist, found that claimant's vision was 20/200 corrected in the right eye and 20/300 corrected in the left eye, claimant's loss of sight, while not "total," is a very severe loss and that it is a "matter of semantics" because while claimant may have "some rudimentary vision," it is "for all practical purposes nonfunctional," and he has a very severe visual impairment which renders him legally blind and which stems from damage to the optic nerves or the visual cortex which involves the processing of information. Dr. K further stated that claimant suffered a severe heat stroke, that he felt there was a low medical probability that claimant would regain consciousness, that claimant has severe organic brain damage and is incompetent to take care of himself, that claimant regained some use of his faculties but remains severely compromised neurologically and mentally, and that concerning claimant's cortical blindness, there is a very high degree of certainty that his visual condition will not improve in the future.

Dr. S, who conducted a neurological examination of claimant for the carrier, reported on October 21, 1998, that claimant's optic discs are mildly pale but otherwise normal and his pupils react equally to light and near; that claimant said he can tell whether a light is on or off and sees shapes but cannot read; that as he walked about the room or moved a chart or object, claimant seemed able to look at it; that claimant was able to touch his finger to Dr. S's finger; and that while claimant clearly had a severe cerebral injury with clear organic deficits, there were also many inconsistencies in the examination and that claimant's vision may be better than the complete blindness suggested.

Relative to the carrier's waiver contention, the carrier introduced a letter from claimant's attorney to the carrier dated March 9, 1998, enclosing the TCB report stating that claimant is legally blind and a Benefit Dispute Agreement (TWCC-24) form, and asking that it be signed if the carrier agreed that claimant is entitled to LIBS. The carrier also introduced its March 26, 1998, letter in response, stating that because claimant did not timely dispute the IR assigned by the Commission-selected designated doctor, apparently referring to Dr. E's 77% IR, the IR became final and LIBS are denied because claimant did not timely dispute the IR.

Section 408.161(a) provides in part that "[LIBS] are paid until the death of the employee for: (1) total and permanent loss of sight in both eyes." Section 408.161(b) provides that "[f]or purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part."

In her discussion of the evidence (we note the decision consistently misstates cortical blindness as "conical" blindness), the hearing officer states that she believes the medical evidence establishes that claimant's compensable injury extends to and includes his cortical blindness (and his right upper extremity problems), both of which are permanent, that she found it irrelevant that the 77% IR did not include a rating for cortical blindness (or the right upper extremity), and that claimant's evidence met the statutory requirements to qualify for LIBS due to his cortical blindness.

The hearing officer found that claimant has a myriad of medical problems shown by the medical records presented which are a consequence of his compensable injury including cortical blindness, diplopia and little ability to use his right hand and arm; that the preponderance of the medical evidence shows that claimant is legally blind, has permanently lost the use of both eyes, and that his vision cannot be corrected; that claimant is unable to obtain or retain employment requiring that he be able to see to perform the duties of the position for which he might be ostensibly hired; that on (date of injury), the statute concerning LIBS which was in effect provided that an injured worker was entitled to LIBS if he had sustained a permanent loss of sight in both eyes; and that the fact that claimant had already attained MMI and was given an IR for the loss of sight due to cortical blindness is irrelevant to his eligibility to receive LIBS. Based on these

findings, the hearing officer concluded among other things that claimant is entitled to LIBS based on permanent loss of sight in both eyes.

The carrier contends that for entitlement to LIBS claimant must have, literally, a total loss of sight and relies on Travelers' Insurance Company v. Richmond, 291 S.W.2nd 1085, 1086 (Tex. Comm. App. 1927, holding approved). In that case, there was evidence that the employee had lost 99% of his vision in one eye without glasses but that 91% remained with glasses. The Commission of Appeals recommended reversing the court of civil appeals, which had upheld a jury verdict for the employee, and remanding for further development, stating that the record showed that the sight of the eye was not totally and permanently lost and hence "the injury sued upon and proved was not compensable according to that term of Section 12, Article 8306, R.S. 1925." The carrier further cited several cases it says relied on Richmond in refusing to find a total loss of sight in the eyes. The carrier also points out that Section 408.161 contains no reference to an employee's being "legally blind," a phrase found repeatedly in the medical evidence and used by the hearing officer. The carrier further contends that the hearing officer's apparent "loss of use" analysis is fundamentally flawed because that analysis applies to loss of use of a body part but cannot apply to the loss of sight because sight is not a body part.

In Travelers Insurance Company v. Seabolt, 361 S.W.2d 204 (Tex. 1962), the Texas Supreme Court considered a workers' compensation case involving an issue over the permanent loss of use of the right hand and, after some discussion of different concepts of the phrase, "total loss of the use of a member," stated that the court was governed by the following proposition or statement of the law:

> A total loss of the use of a member exists whenever by reason of injury, such member no longer possesses any substantial utility as a member of the body, or the condition of the injured member is such that the workman cannot procure and retain employment requiring the use of the member.

In Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, the Appeals Panel held that the standard for determining whether an employee is entitled to LIBS under the 1989 Act is the same as it was under the old law. Citing Seabolt, we stated that the test for total loss of use is whether the member possesses any substantial utility as a member of the body or whether the condition of the injured member is such that it keeps the employee from getting and keeping employment requiring the use of the member. In Texas Workers' Compensation Commission Appeal No. 952100, decided January 23, 1996, the Appeals Panel noted that the Seabolt test is disjunctive and that an employee need only satisfy one prong of the test to establish entitlement to LIBS. *See also* Texas Workers' Compensation Commission Appeal No. 941065, decided September 21; 1994, Texas Workers' Compensation Commission Appeal No. 941190, decided October 17, 1994; and Texas Workers' Compensation Commission Appeal No. 980831, decided June 3, 1998.

Whether an employee suffered a total loss of use of a member is generally a question of fact for the hearing officer to resolve. Appeal No. 980831. We are satisfied that the hearing officer's factual findings concerning claimant's total and permanent loss of sight in both eyes find sufficient support in the evidence and that such findings sufficiently support the conclusion that claimant is entitled to LIBS. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Having in mind the Seabolt test, the hearing officer could find sufficient expert medical evidence for her findings in the evidence provided by Dr. K which is, in turn, corroborated by other medical evidence.

We find no merit in the contention that the hearing officer erred in not finding that claimant waived his right to seek LIBS. The evidence reflects that the carrier took this position because claimant had not timely disputed Dr. E's 77% IR, apparently under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), which included a rating for diplopia. In its appeal the carrier states that the Appeals Panel has applied waiver in a number of situations to avoid the prolongation of disputes, likens claimant's request for LIBS to an extension of injury claim, and cites Texas Workers' Compensation Commission Appeal No. 951494, decided October 20, 1995, a case concerning issues of the correct IR and entitlement to the first quarter of supplemental income benefits. We find no basis for the carrier's waiver contention in that case, or in Section 408.161, or in Rule 131.1 pertaining to the initiation of LIBS.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge